

STATE OF MICHIGAN  
COURT OF APPEALS

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SEAN MICHAEL BERTOLINO,

Plaintiff-Appellee,

v

JENNIFER LYNN BERTOLINO,

Defendant-Appellant.

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UNPUBLISHED  
December 9, 2014

No. 322156  
Ingham Circuit Court  
Family Division  
LC No. 13-000270-DM

Before: JANSEN, P.J., and TALBOT and SERVITTO, JJ.

PER CURIAM.

Jennifer Lynn Bertolino appeals as of right the trial court's order denying her motion to modify legal custody, and awarding Sean Michael Bertolino attorney fees. We affirm.

I. CHILD CUSTODY MODIFICATION

Jennifer first argues that the trial court's denial of her motion to modify custody was improper because she alleged sufficient facts to support proper cause or a change of circumstances. We disagree. "This Court reviews a trial court's determination regarding whether a party has demonstrated proper cause or a change of circumstances under the great weight of the evidence standard," "defer[ing] to the trial court's findings of fact unless the trial court's findings 'clearly preponderate in the opposite direction.'" <sup>1</sup>

In a child custody dispute, the court may "[m]odify or amend its previous judgments or orders for proper cause shown or because of change of circumstances . . . ." <sup>2</sup> "[P]roper cause means one or more appropriate grounds that have or could have a significant effect on the child's life to the extent that a reevaluation of the child's custodial situation should be undertaken." <sup>3</sup> "[T]o establish 'proper cause' necessary to revisit a custody order, a movant must prove by a

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<sup>1</sup> *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009) (citation omitted).

<sup>2</sup> MCL 722.27(1)(c).

<sup>3</sup> *Vodvarka v Grasmeyer*, 259 Mich App 499, 511; 675 NW2d 847 (2003).

preponderance of the evidence the existence of an appropriate ground for legal action to be taken by the trial court[.]” which “should be relevant to at least one of the twelve statutory best interest factors, and must be of such magnitude to have a significant effect on the child’s well-being.”<sup>4</sup>

To demonstrate a change of circumstances, “a movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a significant effect on the child’s well being, have materially changed.”<sup>5</sup> “[T]he evidence must demonstrate something more than the normal life changes (both good and bad) that occur during the life of a child, and there must be at least some evidence that the material changes have had or will almost certainly have an effect on the child.”<sup>6</sup> An inquiry regarding a change of circumstances also considers “the relevance of the facts presented being gauged by the statutory best interest factors.”<sup>7</sup>

Jennifer argued in her motion to modify legal custody that she sufficiently demonstrated proper cause and a change of circumstances because her psychological evaluation proved that she did not have “serious mental health issues which would preclude her ability to parent or function adequately in society.” The record evidence demonstrates, however, that the lower court did not base its original custody decision on the belief that Jennifer had mental health issues. As such, the results of the psychological evaluation do not constitute proper cause or a change of circumstances to warrant a reevaluation of the child’s custodial situation.

Jennifer also asserted below that legal custody should be modified because Sean prevented the child from receiving appropriate medical care, refused to permit Jennifer to enroll the child in Head Start, and denied Jennifer the ability to enroll in a parenting class that required the child’s involvement. Jennifer asserted that Sean “used his role as sole legal custodian as a weapon” in an attempt “to frustrate” her relationship with the child. While significant disputes over a child’s medical treatment and education can be sufficient to warrant review of the custody order,<sup>8</sup> disputes over minor allegations of contempt, visitation, or flexibility in parenting time are insufficient to constitute proper cause or a change of circumstances.<sup>9</sup> Here, Jennifer did not articulate what she meant by appropriate medical care, and did not suggest the child had any serious health concerns. Jennifer also did not offer any proof regarding lack of adequate medical care. Rather, she made conclusory allegations without sufficient factual support. Accordingly, Jennifer did not demonstrate “by a preponderance of the evidence the existence of an appropriate ground for legal action to be taken by the trial court” that would have “a significant effect on the

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<sup>4</sup> *Id.* at 512.

<sup>5</sup> *Id.* at 513 (emphasis omitted).

<sup>6</sup> *Id.* at 513-514.

<sup>7</sup> *Id.* at 514.

<sup>8</sup> See *Dailey v Kloenhamer*, 291 Mich App 660, 665-666; 811 NW2d 501 (2011).

<sup>9</sup> *Vodvarka*, 259 Mich App at 509-510.

child's well-being.”<sup>10</sup> Nor did she provide “evidence that the [alleged] material changes have had or will almost certainly have an effect on the child.”<sup>11</sup>

Further, Jennifer did not provide any evidence that Sean refused to allow the child to be enrolled in Head Start, or that the child required enrollment in Head Start for proper development. She also failed to provide any evidence that any inaction in this area had any effect on the child's well-being.<sup>12</sup> Moreover, Jennifer's claim that she could not enroll in a parenting class because Sean was not flexible with the parenting time and visitation schedule is at its heart a visitation complaint, which is insufficient to demonstrate proper cause or a change in circumstances.<sup>13</sup>

Jennifer argues on appeal that the trial court was required to accept all of the allegations in her motion to modify legal custody as true. Although “the court can accept as true the facts allegedly comprising proper cause or a change of circumstances, and then decide if they are legally sufficient to” show that proper cause or a change in circumstances exists, the court is not required accept as true all allegations presented by the moving party.<sup>14</sup>

Jennifer also contends that the trial court impermissibly denied her motion to modify legal custody because there were contested factual issues that required an evidentiary hearing. The applicable court rule, however, only requires an evidentiary hearing on contested factual issues where those issues “must be resolved in order for the court to make an informed decision on the motion.”<sup>15</sup> As the facts alleged by Jennifer do not demonstrate the requisite proper cause or change of circumstances, the court did not err in failing to conduct an evidentiary hearing.

## II. PSYCHOLOGICAL EVALUATION

Jennifer next argues that the trial court improperly ordered her to undergo a psychological evaluation. We disagree. As a preliminary matter, Jennifer is not appealing the judgment of divorce which indicates that she must undergo a psychological evaluation. As such, this issue is not properly before this Court.<sup>16</sup> Nonetheless, this unpreserved issue is reviewed for plain error affecting Jennifer's substantial rights.<sup>17</sup> “To avoid forfeiture under the plain error

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<sup>10</sup> *Id.* at 512.

<sup>11</sup> *Id.* at 513-514.

<sup>12</sup> See *id.* at 512-514.

<sup>13</sup> See *id.* at 509-510.

<sup>14</sup> *Id.* at 512; see also *Corporan*, 282 Mich App at 605.

<sup>15</sup> See MCR 3.210(C)(8); see also *Vodvarka*, 259 Mich App at 512.

<sup>16</sup> See MCR 7.204(A).

<sup>17</sup> *Huntington Nat'l Bank v Ristich*, 292 Mich App 376, 381; 808 NW2d 511 (2011); *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005).

rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights.’ ”<sup>18</sup>

The circuit court is permitted by statute to “[u]tilize a guardian ad litem or the community resources in behavioral sciences and other professions in the investigation and study of custody disputes and consider their recommendations for the resolution of the disputes.”<sup>19</sup> In the instant case, the trial court explained that the psychological evaluation of Jennifer was ordered to better understand her “disdain” for Sean for future litigation that may occur regarding the custody of the child. As such, the trial court properly ordered a psychological evaluation. Additionally, assuming *arguendo* that ordering Jennifer to undergo the evaluation was improper, as explained above, the results of the evaluation were not used by the trial court to determine custody. Therefore, any error by the trial court did not affect Jennifer’s substantial rights, and relief is not warranted.<sup>20</sup>

Jennifer also erroneously asserts that if a court uses its discretion to order a psychological evaluation, it must consider the psychologist’s conclusion in resolving the custody dispute. The relevant statute,<sup>21</sup> however, does not state that where a court decides to utilize community resources in behavioral sciences it must or shall rely on the professional’s recommendations. Rather, the statute simply provides that a court may avail itself of such services.

### III. ATTORNEY FEES

Finally, Jennifer contends that the trial court erred in awarding Sean attorney fees. We disagree. “We review for an abuse of discretion a trial court’s ruling on a request for attorney fees.”<sup>22</sup> A trial court abuses its discretion when its “decision falls outside the range of reasonable and principled outcomes.”<sup>23</sup> Additionally, a trial court’s finding of frivolousness is reviewed for clear error which is demonstrated “if this Court is left with a definite and firm conviction that a mistake has been made.”<sup>24</sup>

In this case, attorney fees were sought under MCR 2.114(F). Pursuant to that court rule, “a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2).”<sup>25</sup> MCR 2.625(A)(2) states, “In an action filed on or after October 1, 1986, if the

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<sup>18</sup> *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000) (citation omitted).

<sup>19</sup> MCL 722.27(1)(d).

<sup>20</sup> *Kern*, 240 Mich App at 336.

<sup>21</sup> MCL 722.27(1)(d).

<sup>22</sup> *Edge v Edge*, 299 Mich App 121, 127; 829 NW2d 276 (2012).

<sup>23</sup> *Id.* (citation and quotation marks omitted).

<sup>24</sup> *In re Costs & Attorney Fees*, 250 Mich App 89, 94; 645 NW2d 697 (2002) (citation and quotation marks omitted).

<sup>25</sup> MCR 2.114(F).

court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591.” MCL 600.2591 provides in pertinent part:

(1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.

(2) The amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees.

Whether a claim is frivolous depends on the facts and circumstances of the case at the time the party asserted the claim.<sup>26</sup> An action or defense is frivolous if one or more of the following conditions is met:

(i) The party’s primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.

(ii) The party had no reasonable basis to believe that the facts underlying that party’s legal position were in fact true.

(iii) The party’s legal position was devoid of arguable legal merit.<sup>[27]</sup>

The court did not clearly err in determining that Jennifer’s motion to modify custody was frivolous. In her motion, Jennifer alleged that Sean’s behavior denied the child appropriate medical care and the opportunity to be enrolled in Head Start, and also denied Jennifer the ability to enroll in a parenting class. Jennifer, however, did not articulate what she meant by appropriate medical care, and did not provide any evidence in her motion or at the hearing on Sean’s motion to dismiss to support that her allegations were true. Therefore, the allegations in Jennifer’s motion were not sufficiently grounded in fact or law so as to avoid the label of frivolous.

Jennifer also stated in her motion to modify legal custody that she presumed Sean “was awarded sole legal custody based upon the Court’s apparent concern regarding [her] mental health.” At trial, however, the court did not indicate that it believed Jennifer had mental health issues, nor did the original judgment of divorce reference that belief by the court. As such, this Court can only presume that Jennifer relies on the sole fact that the court ordered her to undergo a psychological evaluation to support her theory. Admittedly, the mere fact that a party is not able “to prove its case by a preponderance of evidence” or that “the alleged facts are later

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<sup>26</sup> *In re Costs & Attorney Fees*, 250 Mich App at 94-95.

<sup>27</sup> MCL 600.2591(3)(a).

discovered to be untrue” is insufficient to prove a claim is frivolous.<sup>28</sup> However, the only evidence that Jennifer had that suggested the court based its decision on a belief that she had mental health issues was the order requiring her to submit to a psychological evaluation. Ordering a psychological evaluation is clearly within the discretionary authority of a court.<sup>29</sup> Thus, the speculative nature of the allegation regarding why the court made its custody determination justifies the court’s finding of frivolousness. As a result, the trial court did not clearly err in awarding Sean attorney fees.

Affirmed.

/s/ Kathleen Jansen  
/s/ Michael J. Talbot  
/s/ Deborah A. Servitto

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<sup>28</sup> *Jerico Constr, Inc v Quadrants, Inc*, 257 Mich App 22, 36; 666 NW2d 310 (2003).

<sup>29</sup> See MCL 722.27(1)(d).